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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

Federal Communications Commission
Office of Secretary

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In The Matter of)	MB Docket No. 04-191
)	
San Francisco Unified School District)	
)	
For Renewal of License for Station KALW(FM),)	Facility ID No. 58830
San Francisco, California)	File No. BRED-19970801YA

To: Secretary to forward to
Richard L. Sippel, Chief Administrative Law Judge

REPLY IN SUPPORT OF SFUSD'S MOTION TO ENLARGE ISSUES

1. San Francisco Unified School District ("SFUSD") has moved the Presiding Officer, pursuant to Section 1.229 of the Commission's Rules, 47 C.F.R. § 1.229, to enlarge the issues in this matter in order to include the issue of SFUSD's meritorious service because such service would provide mitigating evidence relevant to some or all of the issues contained in the *Hearing Designation Order*. ^{1/} See *Motion to Enlarge the Issues* (Sep. 7, 2004). For the reasons explained below and in SFUSD's original motion, the Presiding Officer should grant this motion and add the meritorious service issue. However, even if the Presiding Officer were to decide not to formally add this issue, evidence concerning SFUSD's meritorious service should be permitted

^{1/} See *In The Matter of San Francisco Unified School District For Renewal of License for Station KALW(FM), San Francisco, California, Hearing Designation Order and Notice of Apparent Liability for Forfeiture*, FCC 04-114 (rel. July 16, 2004) (the "*Hearing Designation Order*")

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in this matter because such evidence is relevant to the issues already designated for hearing, and in particular to the issues of whether SFUSD's license renewal application should be granted and whether and/or to what extent a forfeiture is warranted.

2. The Enforcement Bureau ("Bureau") has opposed SFUSD's motion to enlarge for a number of reasons, each of which is misplaced. First, the Bureau maintains that the meritorious service issue should not be added to this matter because "this hearing proceeding involves issues of possible misrepresentation." *Enforcement Bureau's Opposition to Motion to Enlarge the Issues*, dated September 21, 2004 ("*Opposition*") at ¶ 4. ^{2/} The Bureau errs, however, in arguing that "the Commission identifies only deceit . . . as a basis for the denial of SFUSD's captioned renewal application." *Id.* To the contrary, the first issue designated by the Commission for hearing is "whether San Francisco School District falsely certified its application with respect to the completeness of the KALW(FM) public inspection file" *Hearing Designation Order*, at ¶ 24(1).

3. Of course, a response on an application may be false without that answer being an intentional misrepresentation or the product of deceit. *See Fox River Broadcasting, Inc.*, 93 FCC2d 127, 129 [¶ 6] (1983) (noting that both misrepresentation and lack of candor require

^{2/} The Bureau also argues that SFUSD's motion is "facially deficient" in that SFUSD did not include "specific allegations of fact" accompanied by supporting affidavits. *Opposition* at ¶ 3. Because SFUSD's motion simply presents the legal issue of whether evidence of meritorious service is appropriate under the circumstances of this case, there was no need for such factual allegations or affidavits. Those requirements are only triggered where factual issues are necessary "to support the action requested." 47 C.F.R. § 1.229(d). No such facts are relevant to SFUSD's motion. In any event, SFUSD respectfully suggests that the Presiding Officer should recognize that evidence of SFUSD's meritorious service is already relevant to the issues designated for hearing regardless of whether a new issue is added to this matter.

“deceptive intent”); *Trinity Broadcasting of Florida, Inc.*, 10 FCC Red 12020, 12063 [¶ 336] (1995) (noting that lack of candor requires “intent to deceive”). For any number of reasons, an applicant may incorrectly respond to a question on an application based on either a misapprehension of fact (*e.g.*, what is in the public inspection file) or of law (*e.g.*, what is required to be in the public inspection file, what is the question asking) without intending to deceive the Commission. But the cases concerning the relevance of meritorious service evidence only call for the disregarding of such evidence where intentional misrepresentations or lack of candor are at issue. *See, e.g., WWLE, Inc.*, 57 FCC2d 407, 407 n. 3 (Rev. Bd. 1975) (noting that consideration of meritorious programming is inappropriate where “culpable conduct” is at issue). Accordingly, because the issues presented by the *Hearing Designation Order* are not limited to the issue of intentional misrepresentation, the Presiding Officer should follow those decisions in which the Commission has recognized that where both misrepresentation issues and other issues are set for hearing, it is appropriate to enlarge the issues to include meritorious programming. 3/ *See, e.g., In re Application of Norjud Broadcasting, Inc.*, 55 FCC2d 808, 808 [¶ 2] (Rev. Bd. 1975); *White Mountain Broadcasting, Inc.*, 54 FCC2d 299, 299 [¶ 2] (Rev. Bd. 1975); *Oil Shale Broadcasting Co.*, 52 FCC2d 1167, 1169 [¶ 4] (1975).

4. Next, the Bureau seems to acknowledge that evidence of meritorious service may be considered in connection with forfeiture issues—like the one set for hearing in this case—but argues that such evidence would not be relevant in this particular case. *Opposition* at ¶¶ 5-6. The Bureau bases this argument on the language of the forfeiture statute which states: “In

3/ Of course, the Presiding Officer may limit the mitigating effect of that such evidence to those issues not involving misrepresentation.

determining the amount of such a forfeiture penalty, the Commission or its designee shall take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history or prior offenses, ability to pay, and such other matters as justice may require.” 47 U.S.C. § 503(b)(3)(D). Contrary to the Bureau’s suggestion, however, nothing in this provision takes away from the relevance of SFUSD’s meritorious service as a broadcast licensee. Instead, the factors set out in the forfeiture provision on their face allow broad consideration of the circumstances of both the alleged violation and of the licensee itself in deciding the appropriate level of any forfeiture. Moreover, Congress clearly indicated that the Commission may consider any “matters that justice may require.” *Id.* SFUSD respectfully suggests that under the circumstances of this case, evidence of SFUSD’s exemplary past service is just such evidence.

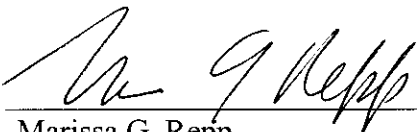
5. Finally, the Bureau suggests that even if the Presiding Officer were to consider SFUSD’s past meritorious service, no evidence from the period after SFUSD’s license term expired in December 1997 (or perhaps even from the time GGPR’s petition to deny was filed in November 1997) should be considered. While SFUSD acknowledges the general rule that evidence of service outside of the license term is not relevant, under the unique circumstances of this case, SFUSD urges the Presiding Officer to exercise his discretion to consider SFUSD’s continued valuable service over the last seven years. Through no fault of SFUSD, the Commission waited over seven years after SFUSD filed its renewal application before designating this matter for hearing. However, as the D.C. Circuit has recognized, a licensee’s “most recent performance [is] most probative,” *Monroe Communication Corp. v. FCC*, 900 F.2d

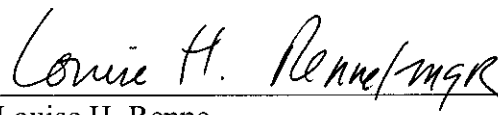
351, 355 (D.C. Cir. 1990). Under these circumstances, it would not be in the public interest to ignore the highly probative evidence of SFUSD's service to its community over the better part of the last decade, and the Presiding Officer should permit evidence of that service.

6. For the foregoing reasons, the Presiding Officer should grant SFUSD's motion to enlarge the issues in order to add the issue of SFUSD's meritorious service. Alternatively, the presiding Officer should recognize that even without the formal addition of the meritorious service issue, evidence of such service is relevant to the issues already designated for hearing in this matter.

Respectfully submitted,

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October 4, 2004

Certificate of Service

I, Regina Hogan, hereby certify that on this 4th day of October, 2004, a copy of the foregoing **Reply in Support of SFUSD's Motion to Enlarge Issues** was sent by first-class mail, postage prepaid, to:

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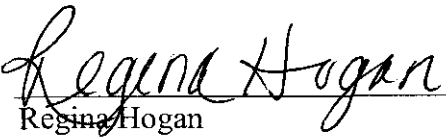
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